Supreme Court, U.S.
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No. 99-190

In the

Supreme Court of the United States

KAREN KUNIN,

Petitioner,

v.

SEARS ROEBUCK & CO.,

Respondent.

On Petition for Writ Of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN

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QUESTIONS FOR REVIEW

1. Whether, pursuant to Title VII of the Civil Rights Act of 1964, when an employee asks her supervisor if cursing is allowed on the sales floor, the question constitutes constructive notice to her employer that one of her co-employees is using sexually harassing language, where the employer has no information or knowledge that any of its employees is using such language in the workplace.

2. Whether this Honorable Supreme Court should reach the issue regarding alteration of the standard of proof for constructive notice to an employer of sexual harassment since plaintiff failed to raise or preserve that issue in the trial court or court of appeals.

3. Whether this Honorable Supreme Court should change the current standard of review under Title VII regarding constructive notice to an employer of sexual harassment occurring among its employees to a "totality of the circumstances" standard, when the current standard takes

into account all circumstances bearing on whether the employer should know of sexual harassment.

4. Whether this Honorable Supreme Court should reach the issue of the appropriateness of awards of front pay and back pay, since the court of appeals did not reach this issue or a key liability issue.

5. Whether front and back pay awards are permitted in Title VII sexual harassment lawsuits where plaintiffs fail to make out a retaliation claim and where they were fired as a result of their own actions.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Sears Roebuck & Co., has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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COUNTERSTATEMENT OF THE CASE

On May 8, 1996, plaintiff, a salesperson in the major appliance division of the Neshaminy, Pennsylvania store of respondent Sears, approached her immediate supervisor, George Kerper, and asked him whether cursing by employees was allowed on the sales floor. With her was a fellow salesperson, Randy Lodato, who had been working in the same department for ten days. Kerper, who was occupied, stopped what he was doing and answered her simply "No." He then resumed what he was doing. Petitioner did not extend the exchange. (A68-69).

Petitioner made the inquiry as a kind of warning for Lodato's benefit. She said nothing about Lodato to Kerper, although she had repeatedly told Lodato that she wanted him to stop using vulgar language when they worked together. Petitioner was disturbed by his frequent use of profanity, including the "f-word," and she avoided him. (A 66-67).

Following petitioner's inquiry to Kerper, Lodato made it clear that he had no intention of stopping his use of offensive language in her presence, and he continued using it. His expressions included the sexually pejorative phrase "fucking bitch" and, on one occasion, discussed below, he referred to petitioner as a "dumb cunt." (A70,75).

Although petitioner had filed written complaints to management for a number of reasons in the past, including one regarding a colleague's denigrating language, she did not complain about Lodato's offensive remarks. (A558, 566, 568, 570, 572-577).

When petitioner made her inquiry regarding cursing on the sales floor on May 8, 1996, Kerper did not know that anyone under his supervision was using sexually offensive language. He had heard rumors of the use of *vulgar* language on the sales floor, but neither those rumors nor petitioner's interaction with him suggested anything more serious than mere vulgarity or cursing. He remained unaware that anyone

was using sexually offensive language until May 18, 1996. (A298).

On May 18, Lodato became angry with petitioner about her method for approaching customers, which he believed hurt his sales. He yelled at petitioner, then moved out of earshot and cursed about her to their colleagues. One of these colleagues told petitioner that he had called her a "dumb cunt," and she confronted him. Petitioner called Kerper who, when he assessed the scene, got petitioner and Lodato to agree to stay away from each other for the remainder of the day, Saturday. The two would not be working together the following day, and the store manager would be in Monday to deal with them further. (A74-75, 302).

That afternoon, however, when petitioner's boyfriend visited the store, she told him what had happened. They chose to leave the store by the entrance near Lodato's work area. Her boyfriend inquired as to which salesperson was

Lodato and then jabbed Lodato in the shoulder. During this confrontation, which set off a commotion, a fellow employee observed petitioner smiling with apparent pleasure. Ultimately, the police investigated the incident. (A79-80, 82-84, 366).

The following Monday, respondent Sears fired Lodato for his improper use of language and fired petitioner for failing to discourage a situation that resulted in physical violence and threats of violence. (A120).

Petitioner sued respondent under Title VII for sexual harassment arising out of a hostile work environment and for retaliation in firing her. The jury expressly found no retaliation by Sears, but awarded petitioner $38,000.00 for pain and suffering for the harassment claim. In addition, despite the fact that it found no retaliation, the jury also awarded petitioner front pay in the amount of $75,000, to which the district court added $46,741.46 in back pay.

Respondent Sears appealed on the grounds that petitioner had failed as a matter of law to establish harassment and that it could not be liable for the alleged harassment because it had rece ′ed no notice of Lodato's behavior. It also sought removal of the awards of front and back pay to petitioner, since the jury had denied petitioner's retaliation claim.

The Third Circuit Court of Appeals did not reach the harassment or damages issues, but found that, as a matter of law, Sears was not liable because it had no notice of the allegedly harassing situation. The Court of Appeals remanded the case with instructions to the district court to vacate the judgment.

Plaintiff then filed the instant petition for certiorari.

SUMMARY OF ARGUMENT

Petitioner has failed to present any compelling reason for the Court to grant her petition for certiorari. The petition does not meet any of the criteria set forth in Sup. Ct. R. 10 as bases for granting certiorari.

The Court should also deny the instant petition because the petitioner failed to preserve the employer notice issue in proceedings in the courts below. Indeed, the instant petition represents the first time she has raised the issue.

Although petitioner argues that the Court should accept an appeal so as to remove uncertainty and clarity in the applicable law, in reality there is no such uncertainty and clarity. No disagreement exists among the courts of appeals, nor are the current standards regarding employer notice in sexual harassment in any way "harsh and onerous," as petitioner also maintains.

In addition to being unnecessary, the standard proposed by petitioner would violate basic standards of

fairness and justice by requiring that employers be found liable because of their failure to guess that harassment not brought to their attention was taking place. The current standards, by contrast, restrict employer liability to circumstances where employers actually know of harassment or are given clear communications or circumstances that require them to investigate. No such clear communication took place here, where petitioner indicated to her supervisor that there might be "cursing" on the sales floor but said nothing about harassing or sexually offensive language. The front pay/back pay issue raised by petitioner does not provide a basis for appeal, since it was not reached by the court of appeals. Should the Court grant the petition as to the notice issue and find in favor of petitioner, the pay issue must be remanded to the court of appeals, together with the liability issue of whether harassment actually occurred, which was also not reached by that court.

REASONS FOR DENYING THE WRIT

No compelling reason exists for this Honorable Court to grant the instant petition for certiorari.

The petition fails to meet any of the suggested criteria for granting certiorari that are set forth in Sup. Ct. R. 10. The issues petitioner raise are not the subject of disagreement among the courts of appeals. Sup. Ct. R. 10(a). Indeed, the decisions of the courts of appeals provided the clear standards used by the Third Circuit to determine when an employer can be liable for sexual harassment. Petition, at 11a.

Nor did the Third Circuit decision depart in this case from the usual and accepted course of judicial proceedings; sanction any such departure by a lower court; or decide an important question of federal law that conflicts with decisions of this Court or that must be settled by this Court. Rule 10(a) & (c).

Rather, petitioner advocates only that the Court apply the "totality of the circumstances" standard in determining the question of constructive notice for purposes of employer liability, when this legal issue is currently subject to an analysis that takes into account all relevant facts bearing on whether an employer knew or should have known of the existence of harassment. Alternatively, petitioner invites the Court to rule on an issue not reached by the Third Circuit Court of Appeals.

1. Petitioner Has Waived The Application Of The Current Standard Regarding Employer Notice Of Sexual Harassment And Also Fails To Advance Any Legitimate Rationale For Changing It.

Initially, respondent notes that petitioner neither raised nor preserved the "totality of the circumstances" issue below and has therefore waived it. The record reflects that, prior to the trial court instructing the jury, her counsel reviewed with the court all of the problems and objections she had regarding the charge, which the court had supplied to

counsel. During this colloquy, petitioner did not once raise the issue of the "totality of the circumstances" standard. (A. 413-15, 422-25). Similarly, the record reflects no objection to the charge as given, despite the fact that the court did not instruct the jury as to "totality of the circumstances" standard. (A.482). Nor did petitioner raise or argue the issue on appeal.

Petitioner's failure to raise the issue of the totality of the circumstances standard, except as an afterthought, is a waiver of it that mandates denial of the instant petition. She requests this Honorable Court to effect a change in the law despite the fact that she has not even sought orders and opinions from the lower courts which would form the basis for this Court's consideration of the issue.

Petitioner argues that the Court should rule on the notice issue to remove uncertainty and lack of clarity. However, as evidenced by the opinion of the court of appeals, there is no uncertainty or lack of clarity with regard

to the applicable standards. The circuit courts have written little about the topic because it is rarely an issue. Petitioner does not cite even one decision in which the court mentions, let alone calls into question, the appropriateness of the standards applied. Petitioner's position that current standards are harsh and onerous thus has no support in the decisional law, either.

Petitioner's central argument, that constructive notice of sexual harassment should be imputed to an employer for failing to investigate rumors of legal activities because they might conceivably involve an illegal (sexual harassment) activity, is nonsensical. If such a standard were adopted, the focus of litigation over the issue of employer liability where an employer did not actually know of harassment would shift from the question of whether the employer "should have known" that harassment was actually occurring in the work place to the question of whether the employer "should have guessed" that harassment might be occurring. Such a "guess

where it may be happening" standard would potentially make employers liable for sexual harassment occurring anywhere and any time in the workplace, regardless of what they actually knew. In order to protect themselves from potential liability and at considerable expense, employers would have to play watchdog over work places for any hint of harassment, lest notice of it be imputed to them. Such a drastic change in the legal standard is completely unnecessary, when a potential plaintiff such as petitioner can establish knowledge or the duty to acquire knowledge on the part of an employer by actually complaining regarding perceived harassment. The legal standard should not be altered because a plaintiff such as petitioner does not deem harassment worth complaining about. Moreover, the record establishes beyond dispute that petitioner knew procedures for complaining to management and had used them with some frequency.

Petitioner attempts to draw a parallel between the facts of this case--where petitioner asked her supervisor only about the company policy regarding cursing, as opposed to using sexually offensive language--and a situation where a grocery store customer asks if it is permissible to spill water on the floor. The situations are not analogous, however. The grocer who is asked about spilled water knows precisely what the implication of the question is: people can slip on it and injure themselves. By contrast, the supervisor of petitioner who is asked if "cursing" is allowed on the sales floor can conclude only that someone might be cursing on the sales floor: the existence of cursing, however, is not illegal and, if the cursing does not involve sexually offensive language--and petitioner gave no hint that it did--the employer has no other information that gives it legitimate reason to investigate.

Accordingly, respondent would have been liable under the standard proposed by petitioner because her

supervisor did not guess from her question that she was really concerned about an issue she never mentioned in her exchange with him or afterwards.

The law does not require employers to read their employees' minds. It properly requires an employer who learns of the existence of harassment or has a good reason for investigating the possibility of it, to investigate. Equally appropriately, it does not require an employer who has no reason to know of or to investigate harassment to embark on a wild goose chase in search of it.

Accordingly, respondent respectfully requests the Court to deny the instant petition for certiorari.

2. The Third Circuit Court of Appeals Did Not Reach the Issue of Front and Back Pay, as well as the Liability Issue of Severe and Pervasive Harassment, and this Case Should Be Remanded In The Event This Court Reverses the Court of Appeals As To Employer Liability.

Petitioner has also raised the issue of whether front pay may be awarded to her where she has not prevailed on

her claim against respondent for retaliation. This Court should deny the instant petition to the extent it is based upon on the front pay issue.

Respondent raised the issue of the propriety of the front pay award and the district court's award of back pay, first in the trial court and then in the court of appeals.

The trial court ruled favorably to petitioner, and the Third Circuit did not reach the front pay/back pay issue, since it determined there could not be any liability in the absence of notice to respondent that harassment was occurring (see Section 1 above).

In addition to the front pay/back pay damage issue, the Third Circuit did not reach the liability issue, raised by respondent, of whether the alleged harassment of plaintiff was pervasive or regular enough to be actionable.

The Court does not hear issues on appeal that have not been reached by the lower courts, but remands such issues for consideration by those courts. See, e.g., Bowman

Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 95 S.Ct. 438, 441, (1974).

Accordingly, respondent respectfully requests that the Court deny the instant petition as regards the front pay/back pay issue and, in the event the Court hears an appeal as to the "totality of the circumstances" issue and rules in favor of petitioner, that it remand this case to the Third Circuit Court of Appeals for adjudication of the "severe and pervasive" and "front pay/back pay issues."

CONCLUSION

For all the above reasons, respondent respectfully requests this Honorable Supreme Court to deny the instant petition for certiorari.

Respectfully submitted,

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